SUPREME COURT, U.S.
FILED
1972
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In The

Supreme Court of the United States

October Term, 1971

No. 71-1018

JOHN MALONEY,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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No.

JOHN MALONEY,

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- against -

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

JOHN MALONEY, the petitioner herein, respectfully prays that this court issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review the order of that court which both reversed and affirmed the judgments of the United States District Court for the Southern District of New York convicting

the petitioner of violating 18 U.S.C. §659 and conspiracy to do the same, 18 U.S.C. §371.

The Court of Appeals reversed the conviction with respect to the conspiracy, but affirmed on the substantive count. It is significant, however, to note that the Court of Appeals reversed both the conviction under conspiracy and the substantive counts with respect to two other appellants namely Vincent Santa and Albert Mercurio.

Opinion Below

The opinion of the Second Circuit is reprinted in the appendix hereto.

Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C. §1254 (1). The Court of Appeals, Second Circuit, denied a motion for a re-hearing and a re-hearing en banc on January 10, 1972, but stayed the mandate of the court pending certiorari. (See appendix)

Questions Presented

1. Whether petitioner could be convicted of an anticipatory crime?

2. Since there was no evidence at all that petitioner was ever in possession of the article allegedly stolen from interstate commerce, was it possible to convict him on the basis of suspicion alone without one iota of evidence that he was ever in possession of the stolen items or that he ever offered to buy or receive them?

3. Since it is conceded that Maloney never bought, received, or possessed any of the merchandise found in the garage, and since it is further conceded that he was never seen at or in the garage, was it not a violation of due process to permit a conviction to stand which is clearly based upon suspicion alone?

4. Whether transportation in interstate commerce can be inferred solely because certain goods had been loaded on trailers in New Jersey, awaiting tractors scheduled to carry them to New York? No actual evidence that the goods were ever carried to New York exists.

Constitutional and Statutory Provisions Involved

The Fifth Amendment of the United States Constitution and 18 U.S.C. §371 and §659 are involved herein.

Statement of the Case

On Friday, March 21, 1969, two trailers loaded with cigarettes and health and beauty aids were stolen from the Crown Drug Stores Distribution Center in Cranford, New Jersey. The trailers were completely loaded awaiting tractors scheduled to carry the goods to retail stores in Long Island, New York.

Five days later, on March 26, 1969, a federal agent and New York City detectives, acting on a tip from an informant, commenced a surveillance of a garage on East 172nd Street in the Bronx

which had been rented by one DiMenna, ostensibly as a warehouse for a construction business.

At about 10:00 P.M., after a six hour surveillance, the agents found that the front door was locked, but by peering through a window, they were able to perceive numerous cardboard cartons marked "Return to SGC Corporation" (the parent corporation of Crown Drug Stores). At 5:30 A.M. the next morning, DiMenna drove up in a car removed some of the cartons and drove off. By 9:20 A.M., another car drove up and Vilhoti, Mercurio and Santa entered the garage.

At this juncture, it should be noted that Maloney was never seen entering the garage nor did any witness ever place him near the garage.

When Vilhoti opened the door in response to the agents, he was immediately arrested as were Mercurio and Santa.

In the back of the garage was a large number of cartons which were part of the shipment stolen from Crown Drug Stores.

At least an hour later, while the three men were still being held in custody in the garage, appellant Maloney, knocked on the garage door and was promptly arrested.

A search of his person found him in possession of lists of items in his own handwriting which

were somewhat similar to copies of lists found in the garage under a carton.[1]

The lists detailed items which allegedly had been in the hijacked trailers, but which supposedly had been removed from the garage. In other words, none of the items on Maloney's lists were actually found in the garage.

Maloney's lists also had prices next to them representing their costs, but an examination of this exhibit will reveal to this court that the prices could not have been written in Maloney's handwriting.

In addition, Maloney was found in possession of the sum of $3,100.00 in cash. One-half the value of the merchandise represented on the lists came to $3,120.09.

The government's theory was that Maloney had intended to buy these items. There was no evidence of this, only a surmise.

Obviously, since he was arrested the moment he knocked on the garage door, he had no opportunity to make any purchase at all. Moreover there was no evidence that he had ever received or purchased or possessed any of the items that were stolen.

At most, there was an anticipatory inference that had Maloney been given the opportunity, he

---

1. The Court of Appeals said they were "carbon copies", but a comparison will, we believe, reveal differences.

might have negotiated to purchase some of the items. This however was pure conjecture.

The theory of the government was that since Maloney had possession of these lists, even though it conceded that none of the items thereon were found in the garage, that Maloney must have at one time received them. There was no evidence to substantiate this theory since it rested upon an inference not based upon any tangible evidence.

In the final analysis, therefore, the record is barren of any evidence tending to show that Maloney was in conspiracy with anybody; nor that he had supplied, purchased, received or otherwise dealt in the goods which allegedly were stolen in interstate commerce; nor that he had in any way committed a crime.

At the very most, the jury might have inferred that Maloney came to these premises with the intent to purchase certain items, but since he was arrested the moment he knocked on the door, and the other persons were already in custody, it is obvious that he had no opportunity to even attempt this crime and this, too, therefore would be wholly speculative.

Argument

Point 1.

THERE WAS NO EVIDENCE WHATSOEVER THAT PETITIONER MALONEY EVER BOUGHT, SOLD, RECEIVED OR OTHERWISE DEALT IN THE PROPERTY WHICH WAS FOUND IN DIMENNA'S GARAGE. ON THE SAME EVIDENCE, TWO CO-DEFENDANTS HAD THE INDICTMENTS DISMISSED BY THE COURT OF APPEALS. THE COURT BELOW HAS PERMITTED A CONVICTION TO STAND WHICH IS PREDICATED UPON NO EVIDENCE WHATSOEVER. THE CONVICTION IS SANS DUE PROCESS.

The Court of Appeals has reversed all of the judgments of conviction with respect to the conspiracy which was charged in this indictment, and also has reversed the substantive conviction for a violation of 18 U.S.C. § 659 as to co-defendants Mercurio and Santa.

We submit that the conviction herein is a denial of due process of law because it rests exclusively upon inference based upon conjecture and not upon any evidence whatsoever.

At the outset, it cannot be disputed that Maloney was never seen in or near DiMenna's garage prior to the day that he was arrested.

On the date of his arrest by the authorities, the other three co-defendants had been taken into custody at least an hour previously and were being held captive by the authorities inside the garage: The agent who had effectuated the arrest stated that he would have taken into custody any person,

not a police officer, who may have knocked on the garage door that day.

There were items contained in the garage which allegedly had been stolen from a shipment which the government claimed moved in interstate commerce at one time.

The only evidence against Maloney, therefore, was certain lists itemizing sundries, cosmetics and the like which supposedly were of the same nature as those which had been stolen from the Crown Drug Company in New Jersey.

It is extremely important to note that the lists found in Maloney's possession were not identical to the inventory of the items stolen, but rather were generically similar because the items were similar. On page 9 of their brief in the Court of Appeals, the government admitted that there was "no proof that he (Maloney) bought, received or possessed the goods remaining in the garage."

The government argued however that there was evidence that he had bought, received and possessed goods which had previously been removed from the garage.

There is absolutely no evidence as to what goods were actually removed from the garage, if any, and certainly no evidence that Maloney removed them.

There was absolutely no proof whatsoever that Maloney had participated in any way, shape or form in the removal, receiving or other dis-

position of the goods which the government claimed had previously been taken from the garage.

At most, the government had a "hunch" or suspicion that Maloney was involved. In Baumboy v. United States, 9 Cir., 24 F.2d 512, the Court of Appeals stated that "even the guilty may not be implicated on suspicion alone."

In Poldo v. United States, (9 Cir.) 55 F.2d 866, 869, the Court of Appeals also aptly asserted:

> "Mere suspicion is not enough; there must be circumstances represented to the officers through the testimony of their senses sufficient to justify them in a good faith belief and that the defendant had violated the law."

In essence, the prosecution has created a "presumption of guilt" rather than attempting to argue his case based upon the presumption of innocence prior to verdict.

Ironically, in the case of the co-defendants, Santa and Mercurio, the Court of Appeals declared (slip opinion p. 895):

> "It is well settled that in order to justify a conviction for receiving or possessing stolen goods under §659, the government must establish that the defendants exercise 'dominion or control' over the goods. In United States v. Kearse, 444 F.2d 62 (2d Cir. 1971) this court recently held that a defendant's mere presence six feet away from 40 cartons of stolen merchan-

> disé. . . . was insufficient basis to warrant a conviction for possession under the statute."

Notwithstanding its own language concerning the co-defendants, the court nevertheless applied a completely different doctrine with respect to the petitioner herein.[2]

We submit also that an examination of the exhibit containing the lists which were found in the possession of Maloney, will reveal that the prices were in a different handwriting. Even if this had not been the case however, how in the world can there be an inference of guilt from the mere possession of such lists when admittedly none of the items contained in the garage were on the lists? The government merely surmised that because some items allegedly had been removed, that Maloney had removed them.[3]

There was absolutely no evidence of this!

What happened in the case at bar, is that the government "suspected" that Maloney had been involved, but failed completely to produce proof of this fact. In McMillian v. United States, (5 Cir. 1968) 399 F.2d 478, 479, the Court of Appeals quite aptly declared that proof must be of such probative force as to lead with reasonable certainty to the inference of guilt and must do more than create a mere suspicion.

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2. Since Maloney received a seven year sentence, the error is very grave.

3. Only Di Menna was seen removing cartons.

It is incredible that a Court of Appeals could have come to the conclusion that the evidence was insufficient as to the co-defendants Santa and Mercurio who were found inside the premises when arrested, and who had been seen near the premises previously and yet determine that there was enough evidence against the petitioner.

We defy the government to point out anything in the record that supports their supposition that petitioner herein in any way, shape or form received or in any other way, dealt with the merchandise which the government claims had been previously removed from the garage.

Certainly the petitioner had never been found in possession or in control of any of these items.

Point II.

THE PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW SINCE HIS CONVICTION WAS BASED ON A TOTAL DEARTH OF EVIDENCE. NO WITNESS TESTIFIED TO ANY OF THE FACTS CONNECTING MALONEY WITH THE CRIME CHARGED EXCEPT THE ARRESTING OFFICER WHO MERELY OBSERVED MALONEY FOR THE VERY FIRST TIME WHEN HE KNOCKED ON THE DOOR OF THE GARAGE. POSSESSION OF LISTS CONTAINING NONE OF THE ITEMS IN THE GARAGE WAS NO EVIDENCE OF GUILT.

It is respectfully submitted that due process of law was violated in connection with the conviction in this case. The Court of Appeals reversed the convictions of two of the co-defendants, Santa and Mercurio, on the grounds of

a total lack of evidence. All of the defendants including the petitioner herein, received a reversal with respect to the conspiracy count.

It is respectfully submitted that there was no evidence tending to connect petitioner with the substantive count of receiving or possessing the alleged stolen items. In the preceding point, we have already noted the total dearth of evidence implicating Maloney. In Coppedge v. United States, 369 U.S. 438, the Supreme Court of the United States explained and cautioned: (id at 449):

> "When society acts to deprive one of its members of life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called measures by which the quality of our civilization may be judged."

In Hegwood v. Kindrick (967, DC Tex.) 264 F. Supp. 720, 726 the court also aptly explained:

> "Any proceeding by which a United States citizen, regardless of age, is deprived of his liberty must be conducted in accordance with due process of law. This is true regardless of whether the proceedings are characterized as civil or criminal and irrespective of any additional rights derived in the sections of the Constitution. . . . In order to determine whether a par-

> ticular individual has been deprived of his liberty without due process of law, the court must measure the procedures in each case against our traditional notions of fundamental fairness and fair play. . . ."

In effect there has been a presumption of guilt employed in the case at bar not the required presumption of innocence.

Conclusion

The Petition should be granted. The judgment of conviction should be reversed and the indictment dismissed.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

Opinion of the Court Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 202, 291, 307, 358—September Term, 1971.

(Argued November 17, 1971 Decided December 10, 1971.)

Docket Nos. 71-1766, 71-1779,
71-1827, 71-2013

UNITED STATES OF AMERICA,

Appellee,

—against—

RUDOLPH VILHOTTI, VINCENT SANTA,
ALBERT MERCURIO and JOHN MALONEY,

Defendants-Appellants.

Before:

MOORE, HAYS and MULLIGAN,

Circuit Judges.

Appeal from judgments of conviction entered after a joint jury trial in the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge*, for violation of 18 U.S.C. §659 and §2 (possession of chattels stolen from an interstate shipment) and 18 U.S.C. §371 (conspiracy).

Affirmed in part and reversed in part.

JOHN W. NIELDS, JR., Assistant United States Attorney, New York, N. Y. (Whitney North Seymour, Jr., United States Attorney, William B. Gray, Assistant United States Attorney, New York, N. Y., of counsel), *for Appellee.*

THOMAS DAY EDWARDS, New York, N. Y., *for Appellant Vilhotti.*

JEROME LEWIS (Thomas R. Newman, Benjamin H. Siff, of counsel), *for Appellant Santa.*

GUSTAVE H. NEWMAN (Evseroff, Newman & Sonenshine, William Sonenshine, New York, N. Y., of counsel), *for Appellant Mercurio.*

IRVING ANOLIK, New York, N. Y., *for Appellant Maloney.*

MULLIGAN, *Circuit Judge:*

Appellants Rudolph Vilhotti, Vincent Santa, Albert Mercurio and John Maloney appeal from judgments of conviction under count one of an indictment charging violations of 18 U.S.C. §659 and §2 (buying, receiving or having in their possession chattels stolen from an interstate shipment), and under count two, violations of 18 U.S.C. §371 (conspiring to buy, receive or possess such chattels). Judgments of conviction were entered on July 12, 1971 after a five day joint jury trial before Hon. Harold R. Tyler, Jr., United States District Judge in the Southern District of New York. Sentence was imposed as follows: Vilhotti—five years on each count to run concurrently; Santa—four years on each count to run concurrently; Mercurio—three years on each count to run concurrently; Maloney—seven years on count one and five years on count

two to run concurrently. We reverse the convictions of Santa and Mercurio on both counts. We affirm the conviction of Vilhotti and Maloney on count one and reverse and dismiss on count two.

On Friday, March 21, 1969 two trailers loaded with cigarettes and health and beauty aids were stolen from the Crown Drug Stores Distribution Center in Cranford, New Jersey. The trailers were completely loaded awaiting tractors scheduled to carry the goods to retail stores in Long Island, New York.[1] Five days later, on March 26, 1969 a federal agent and New York City detectives, acting on a tip from an informant, commenced a surveillance of a garage on East 172d Street in the Bronx which had been rented by one DiMenna, ostensibly as a warehouse for a construction business. At about 10:00 p.m., after a six hour surveillance, the agents found that the front door was locked but by peering through a window were able to see numerous cardboard cartons marked "Return to SGC Corporation" (the parent corporation of Crown Drug Stores). At 5:30 a.m. the next morning, DiMenna drove up in a car, removed some of the cartons and drove off. At about 9:20 a.m. another car drove up, and Vilhotti, Mercurio and Santa entered the garage. The agents found that the door was still locked but gained entry when Vilhotti opened the door from the inside. He was immediately arrested, and Mercurio and Santa were arrested inside the garage. In the back of the garage was a large number of cartons which were part of the shipment stolen from Crown Drug Stores. In addition, the agents found labels which had been re-

1. This constituted an effective delivery of the goods to the carrier, sufficient to render the goods part of interstate commerce as required by the statute. *United States* v. *Gollin*, 166 F.2d 123 (3d Cir. 1947), *cert. denied*, 333 U.S. 875 (1948); see *United States* v. *Berger*, 338 F.2d 485 (2d Cir. 1964), *cert. denied*, 380 U.S. 923 (1965); *United States* v. *Cousins*, 427 F.2d 382, 385 (9th Cir. 1970).

moved from cartons stolen from a Connecticut terminal in December, 1968.

About an hour later, while the three men were being held in custody in the garage, appellant Maloney knocked at the garage door. Maloney was promptly arrested, searched and found in possession of lists of items in his own handwriting, which were carbon copies of lists found in the garage under a carton. The lists detailed items which had been in the hijacked trailers but which had been removed from the garage. Maloney's lists also had prices next to the items representing their cost. These items were totalled and divided in half. The sum of $650 was added, making a total of $3120.09. The sum of $3100 in cash was found in Maloney's possession.

The government's theory was that DiMenna, who was also indicted but died before trial, was using the Bronx garage as a storage place for goods from the hijacked trucks. There was testimony that trucks were driven into the garage almost daily, remained for periods of a quarter of an hour to an hour and were then driven away. There was no evidence to support the contention that DiMenna was actually operating a construction business, except that there were a few shovels and bags of cement on the premises.

We find ample evidence to support Maloney's conviction as a principal under count one of the indictment. He had in his possession lists of items which had been hijacked and which the jury could have properly found were taken to the Bronx garage and removed prior to the March 27th arrests. His presence at the garage that morning with a large amount of money under the circumstances described, was obviously for the purpose of paying off on the basis of half the value of the stolen goods. The presence of duplicate lists in the garage in his handwriting further supports the government's case that Ma-

loney had bought, received or possessed goods which had been stolen in interstate commerce.

The government's case against Santa and Mercurio is based solely upon their presence in the garage on the morning of their arrest. Santa testified that Vilhotti, whom he had previously known, suggested to him that DiMenna had a construction job and would need extra Saturday help. He met Vilhotti by arrangement at a Bronx restaurant that morning and there met Mercurio for the first time; he also stated that he was looking for extra work from DiMenna. After arriving at the garage the three were arrested within a matter of minutes and all were at least a hundred feet away from the rear of the garage where the stolen cartons were lodged. There is nothing in the record to establish that either Santa or Mercurio was ever in or near the garage before that day. There is no evidence at all that they exercised any dominion or control over any of the contents of the garage or that they, in fact, even knew that the garage contained stolen property. In essence, the government's contention is that their presence alone is sufficient to establish knowing possession.

We hold that the mere presence of Santa and Mercurio in the garage is insufficient as a matter of law to establish either actual or constructive possession. It is well settled that in order to justify a conviction for receiving or possessing stolen goods under Section 659, the government must establish that the defendants exercised "dominion or control" over the goods. *United States* v. *Casalinuovo*, 350 F.2d 207, 209 (2d Cir. 1965). In *United States* v. *Kearse*, 444 F.2d 62 (2d Cir. 1971), this court recently held that a defendant's mere presence six feet away from forty cartons of stolen merchandise, which practically filled a small living room, was an insufficient basis to warrant a conviction for possession under the statute.

The government cites no contrary authority. In addition to the numerous cases cited by Judge Moore in *United States* v. *Casalinuovo, supra*, 350 F.2d at 209-10, we further refer to our recent opinion in *United States* v. *Steward*, Slip op. nos. 239-40, (2d Cir., decided Nov. 29, 1971) holding that a defendant's mere presence as the driver of an automobile, which carried a passenger who had possession of drugs, was insufficient to attribuate possession to him. Here there is a total absence of any evidence to establish a *nexus* between Santa and Mercurio and the theft or the garage "drop." Their momentary presence prior to arrest is legally insufficient to establish any degree of knowledge in the absence of which there can be no dominion or control. See *United States* v. *Romano*, 382 U.S. 136 (1965). The absence of any evidence, apart from their mere presence, to support the government's contention that Santa and Mercurio knew that the stolen goods were in the garage, similarly requires a reversal of their conviction on the conspiracy count. The evidence establishes only that they were acquainted with Vilhotti and possibly Maloney, but this is clearly insufficient to sustain a conspiracy conviction. *United States* v. *Euphemia*, 261 F.2d 441 (2d Cir. 1958).

The case against Vilhotti however is buttressed by other evidence which properly warranted the jury verdict of guilty on the substantive count. Vilhotti was seen two or three times a week in the immediate vicinity of the garage; he was seen going into the garage; he was seen with DiMenna. The jury could have properly found that the garage was locked when Vilhotti entered on the morning of the arrest and that he must have had a key. In view of the purposes for which the garage was obviously utilized, the jury could also have found, beyond any reasonable doubt, that Vilhotti was engaged in the crime of know-

ingly receiving goods which were stolen in interstate commerce. He was clearly not casually or fortuitously present.

Our reversal on the conspiracy counts of Vilhotti and Maloney is based not upon an insufficiency of the evidence but upon the refusal of the trial court, as requested by counsel, to charge the jury that in order to convict for conspiracy, they would have to find that the defendants not only knowingly bought, received or possessed goods which were stolen but that the defendants knew that they were stolen from interstate commerce. The government concedes that the cases in this Circuit have uniformly held that a conspiracy to violate Section 659 and similar statutes requires the specific intention to buy, receive or possess goods which defendants know were stolen from interstate commerce. The cases in this Circuit which have so held are manifold: *United States* v. *Crimmins*, 123 F.2d 271 (2d Cir. 1941) (conspiracy to transport stolen securities in interstate commerce); *United States* v. *Bollenbach*, 147 F.2d 199, 201-02 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 607 (1946) (conspiracy to transport stolen securities in interstate commerce); *United States* v. *Sherman*, 171 F.2d 619, 624 (2d Cir. 1948), *cert. denied*, 337 U.S. 931 (1949) (conspiracy to steal and receive goods in interstate commerce); *United States* v. *Tannazzo*, 174 F.2d 177, 180 (2d Cir.), *cert. denied*, 338 U.S. 815 (1949) (conspiracy to cause stolen goods to be transported in interstate commerce); *United States* v. *Smolin*, 182 F.2d 782, 786 (2d Cir. 1950) (conspiracy to possess goods knowingly stolen while in interstate commerce); *United States* v. *Giuliano*, 348 F.2d 217, 221 (2d Cir.), *cert. denied*, 382 U.S. 946 (1965) (conspiracy to transport stolen securities in interstate commerce).

We are told on appeal by the government that these cases were wrongly decided and should be overruled. While

we can understand the interest in the government in facilitating the conviction of conspirators, we are not at all persuaded that the time has come to overrule a long line of cases which are admittedly controlling. The government urges that while this intent may be necessary in order to find a conspiracy to transport stolen goods across state lines (*Crimmins, supra*), no such intent should be necessary in a conspiracy to receive stolen goods, and that *Sherman, supra,* is an unwarranted extension of the *Crimmins* rule. However, both opinions were written by Judge Learned Hand and in *Sherman* he explicitly based his decision on the *Crimmins* rule (*United States* v. *Sherman, supra,* 171 F.2d at 623-24):

> The fact that this specific intent is not required for a conviction of the substantive crime as it is for the conspiracy, is not at all unique in criminal law and is supported by reason. In *United States* v. *Crimmins, supra,* 123 F.2d at 273, Judge Learned Hand pointed out: "While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past." [2]

The only case the government relies on is *United States* v. *Roselli,* 432 F.2d 879 (9th Cir. 1970), *cert. denied,* 401 U.S. 924 (1971) which involved a conspiracy to violate 18 U.S.C. §2314 (interstate transportation of stolen securities). While that case does hold that intent to transport securities in interstate commerce is not essential for con-

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2 The distinction between the general criminal intent necessary for the completed act of monopolization under Section 2 of the Sherman Act and the specific intent requisite for the inchoate attempt or conspiracy to monopolize was again made clear by Judge Learned Hand in *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 431-32 (2d Cir. 1945) which was decided just a few months after his decision in *United States* v. *Bollenbach, supra.*

viction of a conspiracy and thus is contra to *Crimmins* (which it does not discuss) the court further found that the defendant was aware of the interstate activities in any event. Id. at 893. Moreover, the court does cite *Pereira* v. *United States*, 347 U.S. 1, 12-13 (1954) where the Supreme Court's discussion clearly assumes that an agreement to transport stolen property in interstate commerce is necessary in order to find a conspiracy to violate Section 2314. In fact, in that case the dissent of Mr. Justice Minton, joined in by Justices Black and Douglas, is based on their belief that the government failed to establish this element with respect to one of the conspirators. Id. at 14-15.[3]

The convictions of Santa and Mercurio are reversed and dismissed. The convictions of Vilhotti and Maloney are affirmed on the substantive count and reversed and dismissed on the conspiracy count.

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3 The government's citation of *United States* v. *Blassingame*, 427 F.2d 329 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971); *United States* v. *Kaufman*, 429 F.2d 240, 245 (2d Cir.), *cert. denied*, 400 U.S. 925 (1970) and *United States* v. *Callahan*, 439 F.2d 852, 862 (2d Cir. 1971), *cert. denied*, 40 U.S.L.W. 3162 (U.S. Oct. 12, 1971) is not persuasive at all since the interstate intent discussion in each case involved the substantive count and not the conspiracy. It is conceded that no such intent is necessary for the completed crime under Section 659.

Order of the Court Below Denying Petition for a Rehearing But Granting Stay of Mandate

71-1766, 71-1779,
71-1827, 71-2013

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- x

United States of America,

Plaintiff-Appellee,

v.

Rudolph Vilhotti, Vincent Santa, Albert Mercurio, John Maloney, Alexander Di Giacomo, Anthony Di Menna T/N Salvatore Germani,

Defendants,

Rudolph Vilhotti, Vincent Santa, Albert Mercurio and John Maloney,

Defendants-Appellants.

- x

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant John Maloney,

Upon consideration thereof, it is

Order of the Court Below Denying Petition

Ordered that said petition be and it hereby is denied as to rehearing, granted as to stay of mandate.

s/ Leon P. Moore
Leon P. Moore

s/ Paul R. Hays
Paul R. Hays

s/ William H. Mulligan
William H. Mulligan

Circuit Judges

January 10, 1972.

Order of the Court Below Affirming Part and Reversing Part

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of December one thousand nine

Order of the Court Below Affirming Part

hundred and seventy-one.

Present:

HON. LEONARD P. MOORE

HON. PAUL R. HAYS

HON. WILLIAM HUGHES MILLIGAN

Circuit Judges.

[Same Title]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are reversed as to appellants Vincent Santa and Albert Mercurio but as to appellants Rudolph Vilhotti and John Maloney said judgments be and they hereby are affirmed in part and reversed in part in accordance with the opinion of this Court.

s/ A. Daniel Fusaro
Clerk

SUPREME COURT, U. S.

No. 71-1018

Supreme Court, U. S.
FILED
MAR 9 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN MALONEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

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JOHN MALONEY, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted with others of having conspired to buy, receive or possess property stolen from an interstate shipment, in violation of 18 U.S.C. 371, and of a substantive violation of 18 U.S.C. 659. He was sentenced to concurrent prison terms of five years and seven years, respectively. The court of appeals reversed the conviction on the conspiracy count, but

affirmed the conviction on the substantive count (Pet. App. 1a-9a).

The pertinent facts are set forth in the opinion of the court of appeals. Petitioner challenges the sufficiency of the evidence to support his conviction on the substantive count. This contention was raised below and has been fully answered in the court of appeals' opinion (Pet. App. 2a-5a) on which we rely here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1972.

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